

REPUBLIC OF KENYA

IN THE HIGH COURT

AT ELDORET

Civil Appeal 31 of 2005

ANTHONY BACHIA:.....APPELLANT

VERSUS

JOHN MICHAEL WANJAU:.....RESPONDENT

RULING

This is an application by way of Chamber Summons under Order XLI Rule 31 (1) and (2) of the Civil Procedure Rules and sections 3 and 3A of the Civil procedure Act and all other enabling provisions of the Law praying that the Appeal herein be dismissed for want of prosecution and costs be provided for. It is based on the grounds that the Appellant's counsel has made no effort to move the court for any orders and that since the appeal was filed way back on 30th march 2005 no directions have been taken. The other grounds are that it is unfair to subject the Respondent to prejudice of pending litigation which the Appellant has no interest to prosecute and the appeal should be dismissed with costs to the Respondent. Counsel for the applicant/Respondent swore the supporting Affidavit to the application and stated that the memorandum of Appeal was filed on 30th March 2005 and the Record of Appeal was filed on 28th March 2007. He added that no action has ever been taken since then and it is apparent that the Appellant is not keen in prosecuting his Appeal and the same should be dismissed with costs.

In opposing the application the Respondent/Appellant filed grounds of opposition that the application is fatally defective, incompetent bad in law and lacks merit and that the same was premature and the issues of admission of an appeal and giving directions are judicial functions over which the Appellant has no control and in any event todate the Chief Magistrate's court file has never been availed to this court and so the appeal cannot be admitted. At the hearing both counsel made submissions in support of their respective cases.

It is not denied that this appeal has not been admitted to hearing and it is true that the lower court's file has never been availed so as for the Deputy Registrar of this court to execute the procedure as set out in section 79B of the Civil Procedure Act and Order 41 (8) of the Civil Procedure Rules in relation to Appeals. The reason the appeal has not been admitted to hearing is not by the failure of the Appellant. It is the court's failure to procure the court file from which the appeal arises. The Respondent is to be commended for reactivating the process and accordingly the Deputy Registrar of this court is ordered to immediately avail the Chief Magistrate's file in Eldoret CM.CC.NO.1901 of 1994 and diligently prosecute the pre-admission procedures for the Appeal. In the interim and for the reasons given herein the application under consideration is dismissed. Costs will abide in the Appeal.

Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 18th DAY OF NOVEMBER 2009.

P.M.MWILU

JUDGE

IN THE PRESENCE OF:

Mr. Kosgei holding brief for Nyairo

Mr. Omboto holding brief for Okara.

Court clerk - Paul Ekitela